No. 3824

In The

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CENTRAL CALIFORNIA CANNERIES COMPANY, GRIFFIN & SKELLEY COMPANY, J. C. AINSLEY PACKING COMPANY, ANDERSON-BARNGROVER MANUFACTURING COMPANY, GOLDEN GATE PACKING COMPANY, J. F. PYLE & SON, INC., HUNT BROTHERS COMPANY, SUNLIT FRUIT COMPANY,

Appellants,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,

Appellees.

BRIEF FOR PLAINTIFFS-APPELLEES ON DEFENDANTS' APPEALS AND ON PLAINTIFFS' MOTION TO DISMISS THE APPEALS.

FRED L. CHAPPELL,
Kalamazoo, Michigan.
W. A. RICHARDSON,
San Francisco, Calif.
Counsel for Plaintiff-Appellee.

Interstate Brief and Record Co., Detroit, Mich.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3824.

CENTRAL CALIFORNIA CANNERIES COMPANY,
Appellant,
GRIFFIN & SKELLEY COMPANY,
Appellant,
J. C. AINSLEY PACKING COMPANY,
Appellant,
ANDERSON - BARNGROVER MANUFACTURING COMPANY,
Appellant,
GOLDEN GATE PACKING COMPANY,
Appellant,
J. F. PYLE & SON, INC.,
Appellant,
HUNT BROTHERS COMPANY,
Appellant,
SUNLIT FRUIT COMPANY,
Appellant,

v.

DUNKLEY COMPANY (now known as Michigan Canning & Machinery Company) and DUNKLEY COMPANY,
Appellees.

BRIEF FOR PLAINTIFFS - APPELLEES ON DEFENDANTS' APPEALS AND ON PLAINTIFFS' MOTION TO DISMISS THE APPEALS.

It has been stipulated herein that the appellees' motion to dismiss the appeals might be argued at the same

date and independently of the appeals herein, but it is believed that the whole matter can be submitted in this brief and the matter brought to the attention of the court in such a way that the same will be completely and best considered in this way.

The appeals herein are identical and the orders allowing the appeals appear at record pages 298, 304, 310, 316, 322, 328, 334 and 340 respectively. Each order recites:

> "It is ordered that an appeal be and the same is hereby allowed the defendant * * * from the order made, filed and entered herein on August 22nd, 1921, *allowing and granting plaintiff's motion that Dunkley Company be made or added as a party plaintiff herein.*"

The petitions for the appeals follow the orders in each instance and embrace a *petition* for appeal from the order *denying* defendants' motion to reopen, as well as from the order granting the motion of plaintiff.

It will be observed that there is nothing in the orders allowing appeals from the order denying defendants' motion to reopen; so that the matter of reopening the cases on defendants' motion is not before this court.

The defendants' assignments of error, identical in each case, are at record pages 301, 307, 313, 319, 325, 331, 337 and 343 respectively. The first and seventh assignments in each case assign error because of the granting of *plaintiff's motion* to add new party.

The remaining assignments relate to defendants' motion which appeal was not allowed. The second assign-

ment is because of error in denying *defendants' motion* to reopen, and the third, fourth, fifth, sixth and eighth assignments pertain to matters appearing in defendants' said motion.

It is therefore clear that there is no appeal allowed from the defendants' motion to reopen, and the assignments pertaining to defendants' said motion are wholly improper and not to be considered here.

All of the printed record from pages 10 to 296 inclusive pertains to defendants' motion and needs no consideration in this brief, and the exhibits from pages 399 to 484 are all presented in connection with defendants' motion and consequently not properly before this court.

Plaintiffs' motion to add the new party plaintiff appears at record page 2. It recites fully the facts in that behalf, and the prayer at record page 4 is that

> "plaintiff prays that the said new Dunkley Company may be made party plaintiff herein, as it is the chief party in interest and is this plaintiff after reincorporation with increased capital stock."

There is also at record page 4 the prayer of the new Dunkley Company, above referred to, which prays

> "that it may be made a party plaintiff herein, and that it may be substituted in the place of the Dunkley Company herein, having acquired the rights thereof by proper legal assignments and being the said company after the reincorporation proceedings referred to above."

The order appealed from is at record page 297, and recites that

> "the court having filed its written opinion, it is ordered that said motion to reopen the decree be and the same is hereby denied and that the motion to add new party plaintiff be and the same is hereby granted."

This court in issuing its mandate in the main case, being fully advised of the facts, particularly granted leave to the plaintiff to move for the addition of the new party plaintiff, and plaintiffs' motion, at record page 2, recites that the motion is made pursuant to permission given in the mandate of the United States Circuit Court of Appeals.

This court made an order to that effect on Monday, the 20th day of May, 1918. The order denied defendants' motion and directed that

> "the mandate of this court is hereby directed to issue without prejudice to the right of the plaintiffs-appellees herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiffs-appellees may contend is or are necessary parties plaintiff to the action."

The full language of the order, showing the denial of defendants-appellants' motion as well, is as follows:

> "The motion of the defendants-appellants filed in this court on the 1st day of May, 1918, for orders, and submitted for consideration on the 6th day of May, A. D. 1918, vacating the decree heretofore rendered by this court affirming the

> interlocutory decree of the District Court for the Southern Division of the Northern District of California made on the 8th day of December, A. D. 1916, and the order of submission for decision made and entered by said District Court on December 8, 1916, and for other relief as included in the aforesaid motion, denied, and the mandate of this court is hereby directed to issue without prejudice to the right of the plaintiffs-appellees herein to apply to the District Court for leave to make the Dunkley Company or such other corporation or persons as plaintiffs-appellees may contend is or are proper or necessary party plaintiffs to the action."

The said mandate was issued accordingly.

It will be seen, therefore, that this amendment was made by permission of this court and the party added pursuant to the permission and leave of this court, and that the mandate of the court was in no way departed from by the learned trial judge. There is therefore nothing to be submitted to this court on this appeal for its consideration. All has been considered and decided.

This court had also in the original appeal, it will be noted at record page 297, thus refused to modify its mandate in any way on defendants' motion, where the same matter was submitted that was submitted in the defendants' motion that was denied, as to which petition for appeal was made and no appeal was granted or allowed by the trial court. The only question that could be raised is whether or not the District Court has failed to comply with the mandate and order of this

court. And it has not failed. The court has complied in all particulars.

It will be noted that the petitions for appeal in each of the cases recite that the defendants are

> "aggrieved by the *interlocutory* order or decree made, filed and entered in the above entitled suit on August 22nd, 1921."

It will be noted that the plaintiff in no way made any motion relative to the injunctive relief, but has simply added a party.

Equity Rule 37 of the United States Supreme Court recites:

> "Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause."

The new Dunkley Company has simply been added as a party at the time indicated by the order, August 22, 1921. This court had graciously indicated that its mandate was without prejudice to the right of the plaintiff to do this thing provided for by the rule.

The decree of the court still remains interlocutory, and this order appealed from is interlocutory and is not an appealable order. This appears from consideration of Section 129 of the Judicial Code, which is the clause permitting appeals from decrees other than final.

It is therefore very clear that there is nothing submitted on this appeal from the interlocutory order adding the party plaintiff that is proper to be considered by this court. The matter has been previously determined

by this court so far as it could be proper to be considered in this behalf. Anything reviewable by this court should await an appeal from a final decree.

Defendants-appellants' appeals should be dismissed.

Respectfully submitted,

Fred L. Chappell,
W. A. Richardson,
Counsel for Appellees.